



October 19, 1999

Mr. John Steiner
Division Chief
Law Department
The City of Austin
P.O. Box 1546
Austin, Texas 78767-1546

OR99-2953

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 128320.

The City of Austin (the "city") received a request for certain commercial feasibility studies and energy audits done by the city's municipally owned electric utility, Austin Energy. You claim that the information at issue is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. You have submitted the responsive information to our office for review. We have considered your arguments and reviewed the submitted information.

Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. Open Records Decision 592 at 8 (1991). For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it may be afforded the right to claim the "competitive advantage" aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. Open Records Decision No. 593 at 4 (1991). Second, a governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

You relate that section 402.001 (b) of the Local Government Code as well as the Charter of the City of Austin permit the city to authorize Austin Energy to sell a variety of products and

services related to electric service. You further relate that Ordinance 980531-C authorizes Austin Energy to sell electric products and services at "competition-based pricing." You relate that the energy services market is highly competitive; local contractors, subcontractors, investor-owned utilities, unregulated energy service company affiliates, and other energy service companies are active in this market; in the Austin area alone, there are at least ten large energy service companies and numerous large HVAC and controls contractors. You have demonstrated that the city has a market place interest in electric products and services and may be considered a "competitor" in this area for purposes of section 552.104.

You relate that energy audit reports contain energy management recommendations based on on-site evaluations of facilities, in depth analyses of historical energy usage and detailed investigations of opportunities to replace energy equipment. You also indicate that feasibility study information includes confidential facility descriptions, operating procedures, and financial data, and that this information is sensitive to your customers. You further relate that revealing the information places Austin Energy at a competitive disadvantage because it creates a disincentive to your customers and creates an advantage for competitors who are not subject to compulsory disclosure of similar information. You also contend that the subject reports identify products and services needed by your customers to your competitors, thus alerting them to marketing opportunities directly competitive with those of Austin Electric. Lastly, you relate that these reports could be used by your competitors to underbid Austin Energy. We conclude that you have demonstrated that release of some of the subject information will cause actual or potential harm to your interests in a competitive situation. However, the fact that Austin Energy conducted specific studies is not protected, as release of this information does not subject Austin Energy to real or potential harm. We conclude that the first page of the reports must be released and the remaining information withheld under section 552.104 of the Government Code.

As the above discussion resolves this decision, we do not address the arguments raised under other provisions of the Government Code. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Jay Burns", is written over the typed name.

Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 128320

Encl. Submitted documents

cc: Mr. Rick Pfaff
AIRCO Mechanical, Inc.
9200 Waterford Centre Boulevard, #600
Austin, Texas 78758
(w/o enclosures)